No. 83-338

In the Supreme Court of the United States

OCTOBER TERM, 1983

SADIK XHEKA AND BEHA XHEKA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a mixture of gasoline vapors and air that resulted from gasoline-soaked towels having been spread around a closed building constitutes an "explosive" within the meaning of 18 U.S.C. 844(j).

2. Whether the courts below correctly concluded that the charged conspiracy included not only the burning of the restaurant but also the collection of insurance proceeds, so that statements made by an alleged co-conspirator after the building had been burned but while the conspirators were still attempting to collect the insurance proceeds were admissible.

3. Whether the court of appeals correctly held that information allegedly withheld by the government would not have created a reasonable doubt concerning petitioners' guilt and therefore that a new trial was not warranted.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 704 F.2d 974.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1983, and a petition for rehearing was denied on June 7, 1983. The petition for a writ of certiorari was filed as of August 6, 1983.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiring to damage or destroy a building used in interstate commerce by means of an explosive, in violation of 18 U.S.C. 371 and 844(i). Petitioner Sadik Xheka also

was convicted of the underlying substantive offense.[1] Sadik Xheka was sentenced to five years' imprisonment and a fine of $20,000, and Beha Xheka was sentenced to two years' imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. 1-28).

1. The evidence adduced at trial, which is summarized in the court of appeals' opinion (Pet. App. 2-5), showed that petitioners conspired with Wadie Howard to destroy the Bull-n-Bear Restaurant, a restaurant owned by petitioners, in order to collect proceeds from an insurance policy they held on the restaurant. On July 25, 1976, at petitioners' direction, Howard ignited gasoline in the restaurant, causing an explosion and extensive damage to the restaurant.

Howard, an experienced arsonist, was referred to petitioners by co-defendant Chris Callas. Callas told Howard that Callas's friend Sonny (petitioner Sadik Xheka) had a problem that Howard might be able to solve. On July 3, 1976, Howard went to petitioners' restaurant, introduced himself to Sonny, and explained that he had been sent by Callas. Before beginning discussions with Howard, Sonny made a brief telephone call, presumably to verify Howard's credentials (Pet. App. 21). After completing his call, Sonny showed Howard around the restaurant. In the lower cooking level Sonny and Howard met Sonny's brother, petitioner Beha ("Billy") Xheka. Sonny then asked Howard what his price for destroying the restaurant would be. Howard replied that he would charge $5,000 plus expenses. Sonny agreed to that fee, explaining that he could afford it because he had a good insurance policy that included business interruption coverage. Sonny told Howard that he wanted the restaurant burned so that he could obtain these

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[1] Petitioner Beha Xheka was acquitted on the substantive count. Co-defendant Chris Callas was acquitted on both counts.

insurance proceeds, and he assured Howard that he would take care of any problems — financial or otherwise — that Howard might incur from the fire. Sonny then gave Howard $400 to cover his expenses. Billy, who was standing approximately three feet away during this conversation, said nothing. Pet. App. 2; Tr. 427, 465-466, 990.[2]

Howard returned to the restaurant twice to receive payments on his fee. On both occasions, Sonny reminded him that the job had to be completed before the beginning of August. Billy was present during both of these conversations but said nothing. Pet. App. 2-3; Tr. 427-434, 621-625.

On July 23, 1976, Howard delivered two 55-gallon drums to the restaurant. Although the drums' labels stated that they contained fruit juice, Howard had filled them with gasoline. Sonny helped Howard move the drums into the restaurant, and he instructed Howard to store them in the wine cellar. Pet. App. 3.

On Saturday evening, July 24, Sonny gave Howard a key to the restaurant. Howard returned to the restaurant the following night to burn it. He spread hand towels throughout the restaurant and poured gasoline on them. While Howard was preparing the fire, Sonny, Billy and a third man were in the office playing cards. When Howard had finished pouring out the gasoline, Sonny suggested to the others that they leave; Sonny removed some money and insurance papers from the safe and the three men left. Howard then placed one of the gasoline-soaked towels next to the door, lit the end of the towel, and stepped into the street. An explosion and fire ensued. Pet. App. 3-4.

2. Arson investigators determined that the fire had been deliberately set. Suspicion focused on Howard because a

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[2]References to the trial transcript and exhibits are taken from the government's brief in the court of appeals.

building engineer had seen him in the restaurant shortly before the fire, and because a woman parked across the street from the building had seen Howard leave the restaurant immediately before the explosion. Sonny denied any knowledge of Howard or the 55-gallon drums that were found in the restaurant, but when Howard was arrested on July 26, Sonny refused to sign a complaint against him.

Following his arrest, Howard instructed his wife to contact Sonny and obtain bail money from him. Sonny met with Howard's wife on three occasions and gave her the money to secure Howard's release. Following his release on bond, Howard also met with Sonny and asked him for an additional $2,000 for attorney's fees. Sonny gave Howard the $2,000 and an additional $750 one week later. Pet. App. 4-5.

In December 1976, petitioners filed suit against their insurance carrier for more than $800,000 in compensatory damages and $3 million in punitive damages. That suit was still pending at the time of the trial below. Pet. App. 5; Gov't Exh. 14-15.

Howard had no further contact with petitioners, but in July 1979 he met again with co-defendant Callas. By that time, Howard was cooperating with the government, and he wore a transmitter during the conversation. When Howard complained to Callas that the worst thing Callas ever did to Howard was to introduce him to petitioners, Callas asked whether petitioners had received their insurance proceeds. Howard replied that he thought that they had not, and Callas said that petitioners should cooperate with Howard and that he would contact petitioners. Pet. App. 5, 17-18.

ARGUMENT

1. Petitioners contend (Pet. 29-40) that the acts that they were found to have committed constitute nothing more than common law arson and are not within the scope of

18 U.S.C. 844(i) and (j). Petitioners further contend that the Seventh Circuit's conclusion to the contrary conflicts with decisions of another court of appeals. While we concede that there has been some difference of opinion among the circuits concerning the reach of 18 U.S.C. 844, in view of the passage of the Anti-Arson Act of 1982, Pub. L. No. 97-298, 96 Stat. 1319, and the fact that much of the alleged inter-circuit conflict already has dissipated of its own force, this Court's intervention is not necessary.

In the Anti-Arson Act of 1982, Congress amended Section 844(i) to make clear that anyone who damages or destroys a building used in commerce "by means of fire or" an explosive is subject to federal prosecution (§ 2(a), 96 Stat. 1319).[3] Since the new legislation applies to all conduct occurring on or after October 12, 1982 (96 Stat. 1319), the question presented by the petition will not be a recurring one. Review by this Court therefore is not warranted.

Even apart from the 1982 legislation, however, the divergence of views among the circuits was dissipating of its own force. The definition of "explosive" for purposes of 18 U.S.C. 844(i) may be broken down into three parts:

> I: gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders;

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[3]Passage of the Anti-Arson Act is no evidence that the prior law did not cover petitioners' conduct. To the contrary, when Congress enacted the 1982 legislation it expressly stated that its intent was "to *clarify* the applicability of offenses involving explosives and fire." H.R. Rep. 97-678, 97th Cong., 2d Sess. 1 (1982) (emphasis added).

II: other explosive or incendiary devices within the meaning of [18 U.S.C. 232(5): (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone]; and

III: any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. 844(j). The great majority of the courts of appeals that have considered the question presented here have correctly concluded, as did the court below (Pet. App. 6-8), that a mixture of gasoline vapors and air comes within the chemical compound or mechanical mixture portion (Part III) of the definition of "explosive" contained in 18 U.S.C. 844(j). See *United States* v. *Morrow*, Nos. 82-3477 & 82-3478 (3d Cir. Sept. 16, 1983), slip op. 7-9; *United States* v. *Lorence*, 706 F.2d 512, 516-517 (5th Cir. 1983); *United States* v. *Bunney*, 705 F.2d 378, 380-381 (10th Cir. 1983); *United States* v. *Agrillo-Ladlad*, 675 F.2d 905 (7th Cir. 1982), cert. denied, No. 81-2160 (Oct. 4, 1982); *United States* v. *Poulos*, 667 F.2d 939, 941-942 (10th Cir. 1982); *United States* v. *Hepp*, 656 F.2d 350 (8th Cir. 1981).

The single appellate decision on which petitioners rely (Pet. 29), *United States* v. *Gere*, 662 F.2d 1291 (9th Cir. 1981), is not to the contrary. The Ninth Circuit in *Gere* never considered the applicability of the chemical compound or mechanical mixture portion of the definition, on which the court below relied (Pet. App. 6-8), but held only that cardboard boxes soaked with photocopier fluid and connected to each other and to the point of ignition by "trailers" (photocopier fluid and fluid-soaked materials) did not constitute an "explosive or incendiary device" within the meaning of 18 U.S.C. 232(5), as incorporated into 18 U.S.C. 844(j). See 662 F.2d at 1295-1296. Moreover, in a subsequent case the Ninth Circuit expressly stated that if it were not bound by its prior decisions it would adopt the government's position that "an air-fuel mixture created by spreading gasoline inside a building satisfies the intended meaning of 'explosive.' " *United States* v. *DeLuca*, 692 F.2d 1277, 1280 (1982).[4] In view of the Ninth Circuit's own misgivings concerning its prior decisions, *United States* v. *Gelb*, 700 F.2d 875 (1983), in which the Second Circuit relied (*id.* at 878) on *Gere* to hold that uncontained gasoline

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[4]In *United States* v. *Cutler*, 676 F.2d 1245 (1982), decided during the interim between *Gere* and *DeLuca*, the Ninth Circuit had relieved a defendant of a stipulation, entered into in reliance on pre-*Gere* law, that gasoline spread throughout a warehouse and out the door to the point of ignition was an explosive within the meaning of 18 U.S.C. 844(j). Although the *Cutler* court had merely concluded (676 F.2d at 1248) that "without the stipulation, there is insufficient evidence to establish that an explosive was used as required under § 844(i)," *not* that a mixture of gasoline and air could never constitute an explosive within the meaning of Section 844(j), the *DeLuca* court nevertheless deemed itself bound by *Cutler* to reject the government's argument based on the third portion of the definition. The Ninth Circuit's reluctance to parse carefully the definitional provisions of the statute may be attributable in part to its awareness that, in view of the Anti-Arson Act of 1982, it would "not face this problem again." *United States* v. *DeLuca*, 692 F.2d at 1280.

is neither an "explosive" nor an "incendiary device" within the meaning of 18 U.S.C. 844(j), also is of questionable validity.[5]

2. Petitioners next argue (Pet. 40-51) that the district court erred in admitting into evidence, pursuant to Fed. R. Evid. 801(d)(2)(E),[6] the tape of the July 1979 conversation between Howard and Callas because, petitioners claim (Pet. 44-48), the conspiracy ended with the burning of the Bull-n-Bear Restaurant. The courts below correctly concluded (Pet. App. 19-22), however, that the conspiracy with which petitioners were charged continued after the burning of the restaurant to include collection of the insurance proceeds, and that the taped statements thus were made in furtherance of the conspiracy. See also *United States* v. *Walker*, 653 F.2d 1343 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982); *United States* v. *Hickey*, 596 F.2d 1082, 1089-1090 (1st Cir.), cert. denied, 444 U.S. 853 (1979); *United States* v. *Knuckles*, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978) ("it is fair to say that where a general objective of the conspirators is money, the conspiracy does not end, of necessity, before the spoils are divided among the miscreants"). This essentially fact-bound determination does not warrant further review.

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[5] *Gelb* is also factually distinguishable from the present case. According to the court of appeals in *Gelb* (700 F.2d at 877-878), the facts presented at the trial of that case "failed to disclose any evidence of an explosion," whereas it is undisputed that an explosion took place here. Pet. App. 4.

[6] Rule 801(d)(2)(E) provides:

> A statement is not hearsay if —
>
> > The statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Moreover, petitioners' reliance on this Court's decisions in *Krulewitch* v. *United States*, 336 U.S. 440 (1949), *Lutwak* v. *United States*, 344 U.S. 604 (1953), and *Grunewald* v. *United States*, 353 U.S. 391 (1957), is wholly misplaced. The defendant in *Krulewitch* had been charged with conspiracy to induce and persuade a woman to travel to Florida for purposes of prostitution. Statements made by a co-conspirator to the woman more than a month and a half after she had traveled to Florida and returned to New York, and after the defendant, the co-conspirator and the woman had all been arrested, were introduced against the defendant at trial. This Court reversed the conviction, holding that the mere existence of a subsidiary conspiracy aimed at concealing the crime could not support admission of the statements. 336 U.S. at 443-444. *Lutwak*, 344 U.S. at 616-617, and *Grunewald*, 353 U.S. at 401-402, also stand for the proposition that, "after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment."

Here, however, the government did not rely on mere concealment as a continuing aim of the conspiracy. Rather, the continuation of the venture beyond the burning of the Bull-n-Bear was based on the conspirators' ongoing attempts to recover the proceeds of the insurance policy on the restaurant. Accordingly, the decision below in no way conflicts with the principles articulated by this Court in *Krulewitch*, *Lutwak* and *Grunewald*.[7]

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[7]As the court of appeals correctly noted (Pet. App. 21 n.6), the fact that Howard was cooperating with the government at the time of his 1979 conversation with Callas had no bearing on the admissibility of Callas's statements. It is the declarant's relationship to the conspiracy, not that of the listener, that determines the admissibility of a co-conspirator declaration.

3. Petitioners finally contend (Pet. 51-64) that the government improperly withheld exculpatory evidence from them, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). As the court of appeals correctly held, however, "[t]he concern of *Agurs* and *Brady* is whether the suppression of exculpatory material *until after trial* requires that a new trial be given so that the evidence may be considered." Pet. App. 11, quoting *United States* v. *McPartlin*, 595 F.2d 1321, 1346 (7th Cir.), cert. denied, 444 U.S. 833 (1979) (emphasis added). Because, the court concluded (Pet. App. 11-12), in all but one instance petitioners were able to make use at trial of the allegedly withheld information, *Brady* and *Agurs* are inapposite to those allegations.

Petitioners' sixth claim of prosecutorial wrongdoing is that the government suppressed the statement of a cook who allegedly was present during the meetings between petitioners and Howard at the Bull-n-Bear and who would have impeached Howard's testimony concerning those events. The court of appeals examined that information in the context of the entire trial testimony, however, and, employing (Pet. App. 14) the standard of materiality that is applicable where the defense has made only a general request for *Brady* material (see *United States* v. *Agurs*, 427 U.S. at 112-113), concluded (Pet App. 15) that "the addition of [the cook's] testimony to the existing abundance of impeaching evidence [did not] create[] a reasonable doubt." The court of appeals' correct application of the principles announced in *Agurs* to the particular facts of this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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